No. 89-7645

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES J. HYNES
District Attorney, Kings County

JAY M. COHEN
PETER A. WEINSTEIN*
CAROL TEAGUE SCHWARTZKOPF
Assistant District Attorneys
of Counsel

210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2171

*Counsel of Record for
Respondent

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QUESTION PRESENTED

Whether, in the trial of a Latino defendant, the prosecutor properly met his burden of coming forward with race-neutral reasons for his peremptory challenges of two Spanish-speaking prospective jurors, only one of whom had a Latino-sounding surname, where the prosecutor gave as his reasons, and the record established, that these jurors had indicated that they would have a difficult time accepting as final the English translation of Spanish language testimony in a case where important prosecution witness were expected to testify in Spanish.

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PRELIMINARY STATEMENT

Respondent requests that this Court deny Dionisio Hernandez's petition for a writ of certiorari seeking review of an order of the New York State Court of Appeals affirming his judgment of conviction for Attempted Murder in the Second Degree (New York Penal Law §§ 110.00/125.25[1]) (two counts), Criminal Possession of a Weapon in the Second Degree (New York Penal Law § 265.03), and Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02[4]). Hernandez was sentenced to concurrent terms of

imprisonment of four to twelve years for each attempted murder count, one and one-third to four years for second-degree possession of a weapon, and one to three years for third-degree possession of a weapon.

OPINIONS BELOW

The opinion of the New York Court of Appeals, affirming petitioner's conviction, is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85 (1990), and is reproduced in petitioner's Appendix at A. 1-22. The judgment of the New York Supreme Court, Appellate Division, Second Department, affirming petitioner's conviction, is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988), and is reproduced in petitioner's Appendix at A. 22-24.

JURISDICTIONAL STATEMENT

The decision of the New York State Court of Appeals was entered on February 22, 1990. The petition for certiorari was timely filed in this Court on May 23, 1990. This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

At approximately 4:30 a.m. on December 8, 1985, petitioner Dionisio Hernandez [hereafter referred to as defendant] chased Charlene Calloway down Tompkins Avenue near Hart Street in Brooklyn, and shot her twice in the head. Defendant then chased Ms. Calloway's mother, Ada Saline, to the door of a restaurant and fired directly at her head, but missed her when she dropped to the ground. The bullets shattered the glass door of the restaurant and injured two customers inside. Calloway and the injured customers were hospitalized for their injuries. Kings County Indictment Number 7649/1985 charged defendant with Attempted Murder in the Second Degree (two counts), Assault in the First Degree, Attempted Assault in the First Degree, Assault in the Second Degree (two counts), Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree (two counts).

The Jury Selection

After two rounds of voir dire, when nine jurors had been empaneled, defendant, a Latino, objected to the prosecutor's use of peremptory challenges to strike four potential jurors with allegedly Latino surnames. Defendant moved for a mistrial, claiming that the prosecutor had removed every Latino from the venire and that there was "a pattern here of eliminating Hispanics

from the jury" (A. 25-26, 29).[1] The prosecutor responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been convicted of a felony by the Kings County District Attorney's Office. Munoz's brother was then being prosecuted for a violation of probation on that felony (A. 27-28). In addition, Rivera had indicated that time considerations might affect her ability to deliberate (A. 30-32).

The prosecutor stated that he had challenged the other two jurors, Mikus and Gonzalez, because each of them spoke Spanish and each had given the prosecutor reason to believe that he or she would have difficulty accepting the official court interpreter's translation of the testimony of Spanish-speaking witnesses, and might instead rely on his or her own understanding of the Spanish language testimony. The prosecutor's challenges were based on both jurors' hesitant answers to questions during a lengthy examination regarding their ability to disregard the answers in Spanish, and on their demeanor and failure to make eye-contact with the prosecutor during voir dire when questioned about this subject (A. 26-27, 30-31). The prosecutor stated that the ability to rely on the official translation of testimony given in Spanish was very important in this case because several witnesses, including Ada Saline, the chief prosecution witness, were expected to testify through a Spanish language interpreter (A. 27).

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[1] Page references refer to the state trial record except those preceded by "A," which refer to the minutes of the jury selection proceeding as paginated in the appendix to defendant's petition. Names identify the witnesses whose testimony is cited.

The prosecutor also argued that Mikus did not appear to be Latino, and stated that any race-related motivation an attorney might have for excluding Latinos was negated in this case because not only defendant, but every civilian prosecution witness, including each of the four victims, was Latino (A. 29-30).

The court denied defendant's mistrial motion, expressly rejecting the claim that the prosecutor had sought "to exclude all Puerto Rican jurors based upon only the question of ethnicity" (A. 38). The court found as a fact that the prosecutor's challenges were based on non-racial reasons, mentioning, as to two jurors, the concern about deference to the interpreter (A. 35). Defendant never argued that the prosecutor's concern about the jurors' language and the difficulty they might have in accepting the official translation of the testimony was an impermissible basis as a matter of law; nor did he question the facts in the record, including the jurors' hesitancy and refusal to make eye contact, which the prosecutor relied upon to support his contention that these two potential jurors might not accept as final the official translation of the evidence.

The Trial

The People's Case

At approximately 4:30 a.m. on December 8, 1985, Police Officers DENNIS CROWLEY and WILLIAM LIPP stopped their marked patrol car at a red light at the intersection of Hart Street and Tompkins Avenue in Brooklyn (Crowley: 26-28; Lipp: 101-03, 125-

30). The officers saw defendant, armed with a gun, chase Charlene Calloway across Tompkins Avenue in front of the police car, point his gun at Ms. Calloway's head, and shoot her from a distance of one foot. When Calloway fell to the ground, defendant leaned over and fired a second shot at her head. The officers later learned that Ms. Calloway was defendant's girlfriend at the time (Crowley: 25-28, 32-33, 36-37, 53-54, 68; Lipp: 101-103, 105, 107, 118-19, 125-30).

After defendant shot Ms. Calloway, the officers turned on the siren and red flashing lights of their patrol car and ordered defendant to drop the gun (Crowley: 35, 38-39, 68; Lipp: 105-06, 108). Ignoring the officers, defendant chased Calloway's mother, Ada Saline, toward the police car and up to the door of the Orocovis restaurant, located on the corner where the police car was stopped (Crowley: 37-38, 72; Lipp: 106-08). JOSE RUBERO, the manager of the restaurant, and two patrons, VINCENT ALGARIN, and FREDDY NIEVES, were inside the restaurant near the door (Rubero: 4-9, 11, 16; Algarin: 21; Nieves: 146-47).

As Mrs. Saline attempted to open the restaurant door, defendant ran up behind her, aimed his gun directly at her head and fired at least two shots from a distance of approximately two feet. Saline dropped to the ground as the first bullet shattered the glass door (Crowley: 40, 42; Lipp: 109; Rubero 13; Algarin: 22; Nieves: 149). Immediately after the door shattered, Mr. Algarin felt pain in his left thigh, where he had been struck by a bullet

(Algarin: 22-23). Mr. Nieves was struck in the arm by a second bullet (Nieves: 149-50).

After firing at Mrs. Saline, defendant turned, faced the officers, and pointed his gun at them (Crowley: 42-43; Lipp: 110, 125-26). Both officers then fired their guns at defendant and shot him (Crowley: 43-49, 45, 62-63; Lipp: 110, 112, 127, 132). Officer Crowley recovered defendant's five-shot .38 caliber revolver from the sidewalk. It contained five spent shells (Crowley: 46-47, 55, 75-76, 87-88; Lipp: 113, 138). A fully-loaded .25 caliber automatic pistol was recovered from an ankle holster on defendant's leg (Crowley: 48, 87-88; Lipp: 113, 133, 137).

Ms. Calloway, Mr. Algarin, and Mr. Nieves were rushed to nearby hospitals for treatment of their gunshot wounds (Crowley: 50-51; Lipp: 115-17, 120-21; Algarin: 22-23; Nieves: 149-50). Doctor CHRISTOPHER HAGER, an expert in general surgery, treated Calloway, who had three gunshot wounds: one in the palm of her left hand, and two in her head (Hager: 263-67). One bullet was fired directly into the canal of her left ear and lodged below the skin next to her brain (Hager: 264-65, 268-69). The second bullet entered just below her left ear, crossed to the opposite side of her neck, shattered two spinal vertebrae, and came to rest near the internal carotid artery (Hager: 264-65, 269-73). Calloway escaped permanent spinal cord damage, but either bullet could have killed her if it had gone any further (Hager: 272-75).

The Defendant's Case

Defendant Dionisio Hernandez admitted that he was carrying a loaded .38 caliber revolver and a loaded .25 caliber automatic pistol on December 8, 1985, but maintained that he had a valid permit to carry both of these weapons on the street (Hernandez: 287, 292-93, 299-300). According to defendant, he was walking with Ms. Calloway and Mrs. Saline down Tompkins Avenue towards the Orocovis restaurant on the corner of Hart Street at approximately 3:30 to 4:00 that morning, when two men, one armed with a gun, ran up to them and pushed defendant to the ground (Hernandez: 292-93, 339-42). Defendant asserted that he pulled out his licensed revolver and fired wildly into the air until it was empty (Hernandez: 293-94). According to defendant, after his assailants fled into the Orocovis restaurant, the police arrived and, for no reason, shot him twice from behind, hitting him in the left arm and leg (Hernandez: 294-96).

Defendant denied ever intending to kill or injure Ms. Calloway or Mrs. Saline, ever shooting at them, and ever pointing his gun at the officers (Hernandez: 296-98). He asserted that he was living with Calloway, then his girlfriend, on December 8, 1985 (Hernandez: 319, 325). Defendant denied that Calloway had left him a few weeks before the shooting and had returned to Saline's house to live (Hernandez: 318-19). He admitted that Calloway and Saline had gone to Puerto Rico together to visit friends at the beginning of his trial and that Calloway, whom he had married since the shooting, was using his credit card to pay for her trip

(Hernandez: 292, 353-55). Defendant claimed not to know exactly where the two were staying (Hernandez: 353-54).

The People's Rebuttal Case

Detective CASPAR L. GIBBS interviewed defendant at Kings County Hospital at 8:20 a.m. on December 8, 1985, approximately four hours after the shooting (Gibbs: 326, 368). After being advised of and waiving his Miranda rights, defendant told the detective that Ms. Calloway had left him approximately two weeks earlier and had returned home to her mother (Gibbs: 364, 375). Defendant explained that he had gone to a social club earlier that morning to see Calloway and found her speaking with her mother and two Latino men. Defendant claimed that when the men attempted to prevent Calloway and him from leaving, defendant pulled out his gun and began shooting inside the club. Defendant said that he shot at the men from left to right and that he may have accidentally shot Calloway in the process. Defendant asserted that when the men ran away, he chased them and they shot him (Gibbs: 364-65).

The Verdict and The Sentence

Defendant was convicted of two counts of Attempted Murder in the Second Degree, and of one count each of Criminal Possession of a Weapon in the Second and Third Degrees (531-32). The second-degree assault charges for shooting Algarin and Nieves were dismissed at the end of the People's case for failure to prove a prima facie case (284).

On January 30, 1987, defendant was sentenced to concurrent terms of imprisonment of four to twelve years on each attempted murder count, one and one-third to four years for second-degree weapon possession, and one to three years for third-degree weapon possession.

The State Court Appeals

On appeal to the Appellate Division, defendant argued that the trial court had erred when it found that the prosecutor's reasons for exercising peremptory challenges against four allegedly Latino potential jurors were race neutral. In particular, defendant claimed that the prosecutor's explanation that he had challenged two jurors because they spoke Spanish and indicated that they might have trouble accepting as final the English translation of testimony given in Spanish, was merely a pretext for racism. Defendant did not argue that a genuinely held belief in the inability of a particular potential juror to accept the official translation would be an impermissible basis for challenging that juror.

On May 16, 1988, the New York Supreme Court, Appellate Division, Second Department, unanimously affirmed defendant's conviction. The court held that defendant had made out a prima facie case of discrimination because, although the ethnicity of one of the challenged jurors was not certain, the prosecutor used peremptory challenges to exclude the only three prospective jurors who definitely had Latino surnames. People v. Hernandez, 140

A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). The court then ruled that the prosecutor's reasons for challenging the prospective jurors were race neutral and were sufficient to rebut defendant's prima facie claim of discrimination. 140 A.D.2d at 543, 528 N.Y.S.2d at 625.

On appeal to the New York Court of Appeals, defendant again advanced the claim that the prosecutor's challenge of the two prospective jurors who spoke Spanish was racially motivated. For the first time, defendant asserted that the Spanish language and Latino origins are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably an exclusion on forbidden ethnic or racial grounds. Defendant raised, also for the first time, a claim that the prosecutor's use of peremptory challenges violated the New York State Constitution, which, he asserted, provided for a greater degree of scrutiny of peremptory challenges than the Federal Equal Protection Clause.[2]

The Court of Appeals rejected defendant's claim that the language-ethnic factor alone determined this case. People v. Hernandez, 75 N.Y.2d 350, 356, 553 N.Y.S.2d 85, 87 (1990). The court affirmed defendant's conviction, ruling that the prosecutor's belief that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court, which the intermediate appellate court had found was supported by the record, was a legitimate neutral ground for

[2]Defendant also challenged two of the trial court's evidentiary rulings, but does not assert these claims before this Court.

exercising a peremptory challenge. 75 N.Y.2d at 356, 357-58, 553 N.Y.S.2d at 87-88. The court ruled that it was for the trial court to determine whether the prosecutor's explanation was pretextual or real and whether it was justified by the answers and conduct of the challenged jurors during voir dire. Relying on this Court's holding in Batson v. Kentucky, 476 U.S. 79, 98 n.21, 106 S.Ct. 1712, 1724 n.21 (1986), the New York Court of Appeals therefore ruled that the trial court's resolution of these issues was entitled to "great deference" on appeal, and stated that there was no basis in law or policy to conclude that the lower courts in this case had erred in these essentially factual determinations. 75 N.Y.2d at 356-57, 553 N.Y.S.2d at 87-88.

The two dissenting judges ruled that, primarily as a matter of state law, an explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect," and must be subjected to enhanced scrutiny. 75 N.Y.2d at 360-61, 363, 553 N.Y.S.2d 90-91, 92. The dissent held that there was an insufficient evidentiary record to meet this standard because the two Spanish-speaking jurors had assured the trial court that they would accept the official translation, and the prosecutor failed to establish that any other members of the panel had also been asked if they spoke Spanish. 75 N.Y.2d at 362-63, 553 N.Y.S.2d at 91-92.

On May 23, 1990, defendant filed this petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

Defendant's petition for a writ of certiorari should be denied because this case does not present the issue upon which defendant wishes this court to rule. The jurors in this case were not challenged because they were Latino or because they spoke a language common only to defendant's ethnic group and which identified them as members of that group. Rather, as the New York State Court of Appeals properly determined, they were challenged because they had indicated that their knowledge of the Spanish language might interfere with their personal ability to accept the official translation of the testimony in this particular case, where the important witnesses were expected to testify in spanish. Thus, the peremptory challenges of the two Spanish-speaking potential jurors were based on race-neutral reasons rationally related to the facts of the case.[3]

Each of the two Spanish-speaking jurors, only one of whom had a Latino-sounding surname, had indicated, by hesitant answers and failure to make eye contact during extensive questioning on the subject, that his or her knowledge of the Spanish language might interfere with his or her duty to accept the evidence submitted by the court. The trial court and both state appellate courts properly ruled that the prosecutor's explanation for his challenges was based on facts other than race or ethnicity and was supported by the record. The courts also properly ruled that reluctance to

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[3]Defendant does not challenge the prosecutor's reasons for exclusion of the other two jurors, Munoz and Rivera.

accept the official translation of evidence given in another language is an appropriate neutral reason for challenging a prospective juror.

This case involved the expected testimony of one of the victims, Ada Saline, who had been an eyewitness to the entire shooting and who was expected to testify in Spanish with the assistance of a Spanish-language interpreter. Mrs. Saline's testimony was expected to be critical because defendant claimed that strangers had done the shooting, while the police officers had seen defendant shoot at the victims. Another of defendant's shooting victims, Freddy Nieves, also was expected to testify through the interpreter. Thus, the prosecutor had a valid, case-related reason to be concerned about the undue impact a prospective juror's understanding of Spanish could have on the outcome of this case, and was entitled to challenge potential jurors who had manifested uneasiness about accepting as authoritative the official court interpreter's translation of the testimony.

From the jurors' statements and demeanor during extensive questioning on this subject by both the court and the prosecutor, the prosecutor believed that there was a substantial question as to whether two jurors, Mikus and Gonzalez, would accept the interpreter's translation. The prosecutor explained:

> Your Honor, my reason for rejecting the -- these two jurors -- I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

> . . . We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I feel there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury.

(A. 27-28). Defendant responded that the prosecutor was seeking to exclude all Latinos from the jury because he was afraid that Latino jurors would be biased in favor of a Latino defendant, and argued that there was no reason to challenge the Spanish-speaking jurors because these jurors had informed the court that "they could be fair and they could render a fair and impartial verdict" (A. 35). Defendant did not contest the prosecutor's factual assertions that the jurors had been questioned in depth about whether they could accept as final the translated testimony and had expressed hesitancy about their ability to do so. The court responded to defendant's arguments stating:

> Therefore he [the Assistant District Attorney] didn't make a challenge for cause based upon that, but he said that the reason he did in fact remove these jurors is because even though they said they could listen to the interpreter and not let their own evaluation of what the witness says be the answer that they would utilize, he said I have grave doubts, and that's why I'm asking

(A. 35). Indeed, the prosecutor had already informed the court that he had not challenged the two Spanish-speaking jurors for cause because each had said that he or she could be fair and would try to accept the official court interpreter's translation of Spanish-language testimony (A. 35). The court then denied the mistrial motion (A. 38).

Thus, it is clear from the record that the prosecutor's challenge of the Spanish-speaking jurors in this case was entirely due to a reasonable belief that these two jurors would have trouble following the court's instructions to listen to and accept the official translation of the Spanish-speaking witnesses' testimony as the evidence in this case. The prosecutor was not concerned with the race or ethnicity of the people who spoke Spanish, but rather with their ability and willingness to hear and accept as authoritative the same evidence heard by the remainder of the jury.

The state courts appropriately applied the relevant legal test in denying defendant's claim. In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), this Court held that a prosecutor may not rebut a prima facie case of discrimination simply by stating "that he challenged jurors of the defendant's race on the assumption . . . that they would be partial to the defendant because of their shared race. . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive" or by affirming his good faith. Id., 476 U.S. at 97-98, 106 S.Ct. at 1713-14. As the record above demonstrates, that is not what occurred in this case.

Instead, the prosecutor offered a trial-related reason for his challenges, which provided "some satisfactory ground other than the belief that [Latino] jurors should not be allowed to judge a [Latino] defendant." Id., 476 U.S. at 101-02; 106 S. Ct. at 1726 (White, J., concurring). As this Court held in Batson, while a prosecutor is forbidden by the Equal Protection Clause to challenge prospective jurors solely on account of their race, he or she is otherwise entitled to exercise peremptory challenges for any reason at all so long as that reason is related to the prosecutor's view of the outcome of the case. This Court also delineated the standard by which a prosecutor's explanation of his or her peremptory challenges is to be evaluated but did not, as defendant asserts, limit the possible legitimate reasons to a statement of a specific bias.[4] This Court ruled that a prosecutor "must articulate a neutral explanation related to the particular case to be tried," and stated that "there are any number of bases on which a prosecutor may believe that it is desirable to strike a juror who is not excusable for cause." This Court further noted that a prosecutor must give a "clear and reasonably specific" explanation for his or her "legitimate reasons" for exercising the peremptory

[4]Defendant's new claims, that only the articulation of a juror's specific bias, rather than concerns about the juror's fitness to serve on a particular case, can support a legitimate peremptory challenge, and that the prosecutor here failed to assert a bias-based reason to support his challenges, must be rejected by this Court because they were not asserted in any state court. See Kosak v. United States, 465 U.S. 848, 850 n.3, 101 S.Ct. 1519, 1521-22 n.3 (1984); United States v. Lovasco 431 U.S. 783, 789 n.7, 97 S.Ct. 2044, 2048 n.7 (1977) (both holding that this Court will not consider claims not asserted in the lower courts).

challenges. 476 U.S. at 98 n.20. The New York Court of Appeals properly applied these standards and determined that the reason given for challenging the Spanish-speaking jurors in this case was a neutral, case-related reason which was based on the jurors response to specific questions in voir dire.

It would disserve both the principle of Batson and the goal of fair trials to disallow any challenge to individual potential jurors who indicate during voir dire that they will, or might, be unable or reluctant to accept the official translation of testimony. Just as jurors are not permitted to be unsworn witnesses (see Parker v. Gladden, 395 U.S. 363, 87 S.Ct. 468 [1966]) or to rely on their own personal knowledge of the facts, the law, or the witnesses (see Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031 [1975]; Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 [1961]), it is crucial to a fair jury determination that the entire jury hear the same evidence and base its deliberations on that evidence, rather than on their own personal translation of the testimony. Nor would this concern be better met by having jurors who speak a foreign language "second seat" the official court interpreter and bring to the court's attention any reservations about the official translation, as defendant urges (defendant's petition at 8 n.5). The interpreter is certified by the court, required to take an oath of office, and is under a legal duty to translate the testimony accurately and to inform the court if he or she cannot understand the witness. Jurors are under no similar constraint.

Moreover, jurors who indicate that they may rely on their own translations will likely have an undue influence on other jury members whenever a dispute over translated testimony arises during deliberations, simply because they may claim that their recollection of the testimony is based on what the witness really said. In such a case differences over the testimony could not be resolved by the usual means of having the testimony in question read back to the jury since the record would contain only the official translation. In essence, these jurors would become unsworn, unexamined witnesses. Therefore, whenever a potential juror indicates that his or her knowledge of the foreign language in which a witness is expected to testify may interfere with that juror's ability to listen to and rely on the official translation of the witness' testimony, a challenge by either side is appropriate.

Defendant's claim that the Spanish language and Latino ethnicity are so inextricably intertwined that any challenge based on language is necessarily and irrefutably a challenge based on race was properly rejected by the New York Court of Appeals and has not been adopted by this or any other court. Knowledge of the Spanish language in this country is not limited to people of Latino descent. See State v. Pemberthy, 224 N.J. Super. 280, 540 A.2d 227, appeal denied, 111 N.J. 633, 546 A.2d 547 (1988) (peremptory challenges of all jurors who spoke Spanish, in a case involving the interpretation of audiotaped conversations in Spanish, found to be proper and race-neutral, particularly because one of the challenged

jurors was a caucasian who taught Spanish as a career). Nor do all Latinos in this country speak or understand Spanish. Although defendant cites statistics which show that the number of Latinos in Brooklyn, New York who speak Spanish exceeds the number of those who do not (see defendant's petition at 6 n.1), the statistics for Brooklyn may not be representative of the country as a whole.

Thus, common sense refutes defendant's claim that knowledge of the Spanish language defines Latino ethnicity as a matter of law. In any event, the state courts found as a fact that the jurors in this case were not challenged merely because they spoke Spanish, but because they indicated that their knowledge of the Spanish language might interfere with their ability to decide this case upon the same evidence as that understood by the prosecution, the defense, the court and the other members of the jury.[5]

Contrary to defendant's argument, a juror's hesitancy in promising to follow the court's instructions as to what constitutes the evidence is a valid reason for concluding that the juror might be unable or unwilling to follow the court's instructions, even if the juror ultimately claims to be able to put this hesitancy aside.

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[5]Moreover, this case does not present an appropriate factual record upon which to test defendant's language-ethnicity claim for three reasons. First, the prosecutor did not challenge the jurors simply because they understood Spanish. Second, as defendant's current counsel conceded in the amicus brief filed in the New York Court of Appeals, one of the challenged Spanish-speaking jurors, Mikus, did not have a Latino surname (see Brief for Amicus Curiae at 2-3 n.2), and therefore may not even have been Latino. Finally, the defendant did not challenge the prosecutor's or the court's factual characterization of the voir dire, which was not recorded. Thus, the validity of the trial court's factual findings cannot be contested on the record before this Court.

A peremptory challenge need not rise to the level of a challenge for cause. Thus, by its nature, a peremptory challenge may be based on a factor which, although it must be articulable with some specificity, would not support a cause challenge. Because a statement that a juror would not or could not follow the court's instructions is surely a valid basis for a cause challenge, a prosecutor's sincerely and justifiably held belief that a specific juror, despite his or her hesitant assurances to the contrary, would be unwilling or unable to follow the mandate of the court must be sufficient to support a peremptory challenge. Moreover, the jurors in this case were not merely a little hesitant to accept the translated testimony, nor did they simply have to think about the issue a short while before unequivocally assuring the court that they could follow the court's instructions as to what constituted the evidence. Instead, after lengthy questioning by both the court and the prosecutor on this specific issue, these jurors were only able to promise that they "would try" to follow the court's instructions to accept as final the translated testimony.[6]

The cases upon which defendant relies do not support his argument. Instead, these cases stand for the proposition that superficially neutral reasons are not to be accepted at face value, but must instead meet the following criteria: they must be

[6]There is absolutely nothing in the record to support defendant's current claim that every Latino potential juror would necessarily express a similar hesitancy to follow the law as provided by the court.

supported by the information revealed in voir dire; must be related to the case to be tried; must have been applied to all jurors sharing the characteristic, regardless of race; and must not be undermined by the prosecutor's admission of a racial bias. In short, any reason which is found to be pretextual rather than genuine must be rejected. In each of the cases, it was not the asserted reason for the challenge, but the facts which the prosecutor alleged to support the validity of the reason which the courts found to be improper as a matter of law. The Eighth Circuit Court of Appeals in United States v. Wilson, 884 F.2d 1121 (8th Cir 1989) (en banc) and the state courts in Minniefield v. State, 539 N.E.2d (Ind. Sup. Ct. 1989), State v. Slappy, 522 So.2d 18 (Fla. Sup. Ct.), cert. denied, __ U.S. __, 108 S.Ct. 2873 (1988), and People v. Johnson, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978), rejected the prosecutors' explanations for challenging black jurors at the trials of black defendants because the voir dire records did not support the validity of the proffered explanations for the prosecutors' peremptory challenges.[7]

In Minniefield, Slappy and Johnson, unlike the instant case, the prosecutor never even questioned the challenged jurors about the particular infirmity the prosecutor feared they possessed, but assumed that all members of the defendant's racial group shared the bias. Here, the two Spanish-speaking jurors, only one of whom had

[7]In addition, Slappy and Johnson were decided under the State Constitutions of Florida and California, respectively, rather than the Federal Constitution, and thus have lessened precedential value in determining the parameters of the federal Batson rule.

a Latino-sounding surname, were questioned at length by both the prosecutor and the court about their ability to accept as final the translated testimony. Moreover, the New York Court of Appeals found no reason to disturb the trial court's conclusion that there was clear support in the record, based on this questioning, for the prosecutor's concern.

In United States v. Wilson, the Court of Appeals for the Eighth Circuit rejected the prosecutor's explanation for challenging a black juror who lived in the same town as the defendant, while not challenging a white juror who also lived in that town, even though both jurors had denied knowing defendant. The prosecutor asserted that he had challenged only the black juror because he feared that the defendant's friends would try to influence a black resident of the town but would not contact a white resident because there were racial conflicts in the town and "race sets it up like being a member of a lodge." 884 F.2d at 1122-23. The Eighth Circuit appropriately rejected the prosecutor's reasons, ruling that where the prosecutor indicates a stereotypical, racial reason for striking a potential juror, the district court's finding that race was not a factor in the prosecutor's exercise of the peremptory challenge is not supported by the record and cannot be affirmed on appeal. 884 F.2d at 1124-25. Here, by contrast, the prosecutor's belief that the two Spanish-speaking jurors might not follow the court's instructions to accept as final the translated testimony was supported by their responses to questioning by both the court and the prosecutor.

Defendant has never asserted, and there is nothing in this record to suggest, that the prosecutor failed to challenge equally hesitant Spanish-speakers who did not appear to be Latino or that the prosecutor relied on an unexplored fear that anyone who understood Spanish would be unable to follow the court's instructions to rely only on the translated testimony.

Defendant suggests that a prosecutor could not peremptorily challenge a potential juror whose clearly demonstrated bias or unfitness to serve was arguably related to race or ethnicity. For example, defendant appears to claim (defendant's petition at 12) that a prosecutor could not legitimately strike any prospective Latino juror from a jury convened to decide a "crime of passion" if the prosecutor demonstrated through questioning in voir dire that the particular juror possessed a "machismo" attitude or other characteristics which would prevent him from following the court's instructions on the law. That is surely not what Batson commands.

Of course, a prosecutor could not strike all Latinos on this basis without question, because the unsupported assumption that all Latinos share a cultural "machismo" concept which would prevent them from fairly judging crimes of passion is an improper reliance on a racial stereotype. But the mere fact that the particular juror's bias or unfitness arises from a cultural trait that might be shared by some other members of a particular racial or ethnic group does not insulate that juror from challenge, provided that the inference of bias or unfitness is supported by the juror's responses and behavior during voir dire. Defendant's analysis

would apparently preclude the prosecutor from removing jurors of one ethnic group whose personal views suggest a bias or an unfitness to serve, while permitting the exclusion of jurors of other ethnic groups who share the same unfitness or biased view, simply because the latter jurors do not share the race of the defendant.

Defendant's reasoning changes the Batson holding from a rule designed to prevent the improper use of peremptory challenges based solely on race to a rule which would use race to preclude neutral, case-related challenges. Such a rule would not further the concerns Batson was designed to answer -- the need to protect the citizens of this country from racial and ethnic discrimination in the selection of petit juries, while at the same time permitting the exercise of legitimate, case-related peremptory challenges.

In any event, this case is not about racially-discriminatory peremptory challenges, which cannot be tolerated; instead it involves the race-neutral challenges of jurors who hesitated at accepting the court's instructions. Therefore, because this case was properly decided under the standards set forth by this Court in Batson, does not involve an issue upon which there is a split in the Federal or State courts, and lacks the detailed factual record to support defendant's claims, defendant's application for a writ of certiorari should be denied.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
June 28, 1990

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

JAY M. COHEN
PETER A. WEINSTEIN*
CAROL TEAGUE SCHWARTZKOPF
Assistant District Attorneys
of Counsel

210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2171

*Counsel of Record for
Respondent

Peter A. Weinstein

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF KINGS)

I, Theresa Zukas, being duly sworn, state that I am employed in the Office of the District Attorney for Kings County and am over the age of 18.

That on the 28 day of June 1990 I served this document by enclosing a true copy in a postpaid envelope addressed to: Ruben Franco, Kenneth Kimerling, & Arthur Baer, Puerto Rican Legal Defense & Education Fund, Inc., 99 Hudson St., New York, NY 10013
Attorney for: Dionisio Hernandez
at his/her office and by causing it to be deposited in an official depository of the United States Postal Service within the State of New York.

Theresa Zukas

Sworn to before me this 28
day of June 1990

Margaret E. Mainusch

MARGARET E. MAINUSCH
Notary Public, State of New York
No. 30-4962225
Qualified in Nassau County
Commission Expires Feb. 12, 19 92

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